

Pursuant to the authority vested in the Commissioner of Health by Section 2808, of the Public Health Law, Subpart 86-2 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

New subparagraphs (i) and (ii) are added to paragraph (6) of subdivision (m) of section 86-2.40 and paragraphs (7), (8), (9), and (10) of subdivision (m) of section 86-2.40 are amended to read as follows:

(6) Subsequent case mix adjustments to the direct component of the price for rate periods effective after January 1, 2012 shall be made in July and January of each calendar year and shall use Medicaid-only case mix data applicable to the previous case mix period.

(i) For the case mix period beginning July 1, 2019, the case mix adjustment to the direct component of the price for the July 1, 2019 rate period shall use all Medicaid-only case mix data submitted to CMS applicable to the August 2018 – March 2019 period.

(ii) For the case mix periods beginning on and after January 1, 2020, the case mix adjustment to the direct component of the price shall be made in January and July of each calendar year and shall use all Medicaid-only case mix data submitted to CMS applicable to the previous six-month period (e.g., April – September for the January case mix adjustment; October – March for the July case mix adjustment).

(7) Case mix adjustments to the direct component of the price for facilities for which facility specific case mix data is unavailable or insufficient shall be equal to the [base year] previous case mix of the peer group applicable to such facility.

(8) The adjustments and related patient classifications for each facility shall be subject to audit review by the Office of the Medicaid Inspector General[.], and/or other agents as authorized by the Department.

(9) [The operator of a proprietary facility, an officer of a voluntary facility, or the public official responsible for the operation of a public facility shall submit to the Department a written certification, in a form as determined by the Department, attesting that all of the "minimum data set" ("MDS") data reported by the facility for each census roster submitted to the Department is complete and accurate.]

For case mix periods beginning on and after July 1, 2019, the operator of a proprietary facility, an officer of a voluntary facility, or the public official responsible for the operation of a public facility shall submit to the Department a written certification, in a form as determined by the Department, attesting that all of the "minimum data set" ("MDS") data reported by the facility and submitted to CMS is complete and accurate.

[(10) In the event the MDS data reported by a facility results in a percentage change in the facility's case mix index of more than five percent, then the impact of the payment of the Medicaid rate adjustment attributable to such a change in the reported case mix may be limited to reflect no more than a five percent change in such reported data, pending a prepayment audit of such reported MDS data, provided, however, that nothing in this paragraph shall prevent or restrict post-payment audits of such data as otherwise provided for in this subdivision.]

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

Section 2808 of the Public Health Law authorizes the Department to issue regulations relating to rates of reimbursement for nursing homes. The statutory authority for this regulation is contained in subdivision 2-b of section 2808 of the Public Health Law, which authorizes the Department to issue regulations concerning the operating component of rates of Medicaid reimbursement for nursing homes.

### **Legislative Objectives:**

The objective of Public Health Law § 2808 is to enable the Department to set appropriate rates of reimbursement for nursing homes. To this end, the proposed regulations will amend section 86-2.40 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York and codify the Department's revised methodology for establishing nursing home Medicaid rate of payment for patient acuity.

### **Needs and Benefits:**

Current regulations do not specify the amount of data that the Department should use when determining the case mix for nursing homes. The Department has been concerned that past methodologies have not yielded accurate case mix calculations and, for this reason, informed nursing homes that it would begin using larger data sets within the case mix period to determine case mixes, for purposes of calculating rates for periods beginning July 1, 2019. Although not required, these regulations codify the range of data that the Department uses for determining case mix, which was previously determined as a matter of policy.

Additionally, facilities will no longer be required to upload census data separately from the Minimum Data Set (“MDS”) data. The streamlining of the MDS process will reduce administrative burdens on the provider and increase accuracy in Medicaid rates of payment.

Finally, current regulations give the Department discretion to cap changes in a facility’s case mix index at 5%. The Department does not intend to exercise this discretion and, therefore, is repealing this provision.

**Costs:**

The Department began using larger data sets for determining case mix for the period beginning July 1, 2019. The Department expects that the gross Medicaid impact to nursing homes will be \$246 million through the adjustment to case mix methodology, as reflected in the Medicaid “scorecard” approved by the Legislature as part of the 2019-2020 Budget for New York State. These regulations do not impose any additional costs.

**Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:**

There will be no additional costs to private regulated parties. The only data requested from providers are standard periodic reports which are already being completed by providers.

**Costs to State and Local Governments:**

There are no additional costs to the State or local governments as a result of this proposed regulation.

**Costs to the Department of Health:**

There will be no additional costs to the Department of Health as a result of this proposed regulation.

**Local Government Mandates:**

There will be no additional mandates as a result of this proposed regulation.

**Paperwork:**

There will be no additional paperwork as a result of this proposed regulation.

**Duplication:**

The proposed regulation does not duplicate any existing laws or regulations.

**Alternatives:**

The option of not issuing these regulations was considered. However, that alternative was rejected, as the Department should use broader samples of data to obtain the most accurate representation of the case mix in nursing homes.

**Federal Standards:**

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

**Compliance Schedule:**

There is no compliance element to the proposed regulations. The regulations will be effective upon publication of a Notice of Adoption in the New York State Register.

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**REGULATORY FLEXIBILITY ANALYSIS**  
**FOR**  
**SMALL BUSINESSES AND LOCAL GOVERNMENTS**

**Effect of Rule:**

For the purpose of this regulatory flexibility analysis, small businesses were considered to be nursing homes (NH) with 100 or fewer full-time equivalents. Based on recent data collected from nursing homes cost reports statewide, approximately 63 nursing homes were identified as employing fewer than 100 employees. These regulations codify the range of data that the Department uses for determining case mix, which was previously determined as a matter of policy. Additionally, facilities will no longer be required to upload census data separately from the Minimum Data Set (“MDS”) data. The streamlining of the MDS process will reduce administrative burdens on the provider and increase accuracy in Medicaid rates of payment. Finally, current regulations give the Department discretion to cap changes in a facility’s case mix index at 5%. The Department does not intend to exercise this discretion and, therefore, is repealing this provision.

This rule will have no direct effect on local governments.

**Compliance Requirements:**

This proposed rule will streamline reporting requirements and reduce administrative burdens for all nursing homes.

The rule will have no direct effect on local governments.

**Professional Services:**

No additional professional services will be required.

**Compliance Costs:**

There will be no additional costs to private regulated parties as a result of this rule. The only data requested from providers are standard periodic reports which are already being completed by providers.

**Economic and Technological Feasibility:**

There are no new economic and technological requirements imposed as a result of this proposed regulation. Use of existing technology will allow small businesses to comply with no additional cost while the streamlined data requirement will reduce costs.

**Minimizing Adverse Impact:**

This regulation seeks to clarify the data collection process for case mix adjustments in nursing homes rate. All data submitted by nursing homes will be used without requiring a census collection. It will also smooth the rates for facilities allowing for more accurate forecasting. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

**Small Business and Local Government Participation:**

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

**STATEMENT IN LIEU OF  
RURAL AREA FLEXIBILITY ANALYSIS**

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas. In fact, the proposed rule will streamline reporting requirements and reduce administrative burdens for all nursing homes, including those in rural areas.

## **JOB IMPACT STATEMENT**

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.